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No. 93-1310

# In the Supreme Court of the United States

OCTOBER TERM, 1993

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BEVERLY DELL WEST AND ROBERT WESLEY WORTHEN,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the 240-day priority period set forth in Section 507(a)(7)(A)(ii) of the Bankruptcy Code is suspended during the pendency of a bankruptcy proceeding and for six months after its voluntary dismissal.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 5 F.3d 423. The opinions of the district court are reported at 137 B.R. 1012 and 137 B.R. 1016. The opinion of the bankruptcy court (Pet. App. 11a-12a) is unreported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 13a-14a) was entered on September 21, 1993. A petition for rehearing was denied on November 12, 1993. Pet. App. 15a. The petition for a writ of certiorari was filed on February 10, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. a. On June 13, 1988, the Internal Revenue Service assessed income taxes for the years 1982 through 1984 against petitioners. Two hundred and twenty days later, on January 19, 1989, petitioners filed a joint petition under Chapter 13 of the Bankruptcy Code. The IRS filed a proof of claim in that proceeding for petitioners' unpaid tax liabilities. On petitioners' motion, however, the joint Chapter 13 case was dismissed on May 30, 1990. Pet. App. 2a.

b. Petitioners then obtained a divorce. On July 27, 1990, 58 days after dismissing their joint case, petitioners filed separate, individual Chapter 13 petitions. The IRS again filed proofs of claim listing the unpaid taxes for 1982, 1983, and 1984 as "unsecured [priority] claims" pursuant to Section 507(a)(7)(A)(ii) of the Bankruptcy Code (Pet. App. 2a). Under that provision, claims for taxes "assessed within 240 days * * * before the date of the filing of the petition" (11 U.S.C. 507(a)(7)(A)(ii)) are granted seventh priority.

A Chapter 13 plan must provide full payment for any claim entitled to priority under Section 507 of the Bankruptcy Code. See 11 U.S.C. 1322(a)(2). Full payment for *non*-priority unsecured claims, however, is not required under Chapter 13. Such *non*-priority claims are discharged without full payment upon completion of the plan. 11 U.S.C. 1328(a). The plans that petitioners filed in their individual Chapter 13 cases provided for partial payment of the federal tax claims, on a pro rata basis with general unsecured claims.

The government objected to the proposed plans because they did not provide full payment for the priority tax claims (Pet. App. 2a). Because the IRS assessed these taxes within 240 days before the initial, joint Chap-

ter 13 petition was filed, petitioners acknowledged that the tax claims would have been entitled to priority under Section 507(a)(7)(A)(ii) of the Bankruptcy Code in that case. Petitioners contended, however, that the taxes were no longer entitled to priority in the individual cases commenced by their second Chapter 13 petitions because 774 days had elapsed between the time of the assessment and the date on which those petitions were filed (Pet. App. 4a).

Section 108(c) of the Bankruptcy Code suspends non-bankruptcy statutes of limitations during the pendency of a bankruptcy case. 11 U.S.C. 108(c). Section 6503 of the Internal Revenue Code suspends the period of limitations on collection and assessment when a taxpayer's assets are "in the control or custody of the court * * *, and for 6 months thereafter" (26 U.S.C. 6503(b)). Relying on these provisions, the government contended that the 240-day priority period of Section 507(a)(7)(A)(ii) was suspended during the pendency of petitioners' first bankruptcy case and for six months thereafter. The government therefore argued that the 240-day priority period had not expired at the time petitioners filed their second Chapter 13 cases (Pet. App. 11a-12a).

c. The bankruptcy court rejected the government's contention. The court concluded that the suspension of the statute of limitations for the government's claim under Section 108(c) of the Bankruptcy Code had no effect on the 240-day priority period of Section 507(a)(7)(A)(ii) of the Code. The court held that the tax claims were therefore no longer entitled to priority status (Pet. App. 12a).

2. The district court reversed. *United States* v. *West*, 137 B.R. 1012 (D. Ore. 1992); *United States* v. *Worthen*, 137 B.R. 1016 (D. Ore. 1992). The court noted that, in *Brickley* v. *United States*, 70 B.R. 113 (1986), the

Bankruptcy Appellate Panel of the Ninth Circuit held that the priority period established by Section 507(a)(7)(A)(i) was suspended during the duration of the debtor's previous bankruptcy proceedings. The *Brickley* court explained that these provisions are structured to allow the IRS sufficient time to collect a debtor's taxes; permitting serial filings of bankruptcy cases to render taxes uncollectible would make the extension of the statute of limitations in Section 108(c) meaningless. 70 B.R. at 115-116. That court also noted that, if the priority periods of Section 507(a)(7)(A) ran during the pendency of a debtor's prior bankruptcy proceeding, the statutory scheme would be conducive to tax avoidance. 70 B.R. at 115-116. The district court adopted the reasoning of *Brickley* and concluded that the 240-day priority period of Section 507 was suspended during debtors' first bankruptcy case and for six months thereafter. *United States* v. *West*, 137 B.R. at 1016; *United States* v. *Worthen*, 137 B.R. at 1021.

3. On appeal, the government did not contend that the literal terms of Section 108(c) of the Bankruptcy Code and Section 6503 of the Internal Revenue Code required the conclusion that the 240-day priority period of Section 507(a)(7)(A)(ii) was tolled during the first bankruptcy case (Pet. App. 4a). Instead, the government argued that the suspension of the priority periods set forth in Section 507(a)(7)(A)(ii) was a proper exercise of the district court's equitable powers under Section 105(a) of the Bankruptcy Code, 11 U.S.C. 105(a).

The court of appeals affirmed (Pet. App. 1a-10a). The court held that this was the "rare case" in which it was necessary to go beyond the language of a statute "[b]ecause [a] literal interpretation of § 108(c) would frustrate the Bankruptcy Code's intricate scheme for the payment of tax claims" (Pet. App. 6a). The court

explained that "[i]nterpreting § 108(c) literally would allow a debtor to create an 'impenetrable refuge' by filing a bankruptcy petition, waiting for § 507(a)(7)'s priority periods to expire, and then dismissing the case and refiling shortly thereafter" (Pet. App. 7a).

The court rejected petitioners' additional argument that, even if the 240-day period was properly suspended during their first bankruptcy, the IRS's tax claims are still not entitled to priority because the IRS had 278 days after the assessment (220 days prior to the first bankruptcy case plus 58 days after the dismissal of that case and before petitioners' second bankruptcy cases) in which to collect the taxes without hindrance of a pending bankruptcy petition (Pet. App. 9a). Invoking Section 6503 of the Internal Revenue Code, the court held that the priority period should be suspended for a minimum of six months after bankruptcy. The court stated that Section 6503 and "common sense" indicate that such a period is necessary "to provide the IRS with sufficient time to restart and refocus its collection efforts once able to do so" (Pet. App. 9a-10a).

## ARGUMENT

The decision in this case is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Petitioners contend (Pet. 8-9, 13, 19-20) that the decision of the court of appeals unjustifiably disregards the language of Sections 108(c) and 507(a)(7)(A)(ii) of the Bankruptcy Code and Section 6503(b) of the Internal Revenue Code. Petitioners assert (i) that Section 507(a)(7)(A)(ii) "is silent regarding any tolling of the 240-day priority period during the pendency of a bankruptcy filed within that period" (Pet. 9), (ii) that Section 108(c) of the Bankruptcy Code is only applicable to extend

nonbankruptcy law limitation periods, not the priority periods found in Section 507(a)(7)(A) (Pet. 9, 19), and (iii) that, while Section 6503(b) of the Internal Revenue Code suspends the statute of limitations for collection of taxes when "the assets of the taxpayer are in the control or custody of the court * * *, and for 6 months thereafter" (26 U.S.C. 6503(b)), that provision does not refer expressly to extension of the 240-day priority period of Section 507(a)(7)(A)(ii) (Pet. 9, 20). Petitioners further claim (Pet. 13-15) that this is not one of those "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters" (Pet. 13, quoting *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989)).

As the Tenth Circuit correctly concluded in *Richards* v. *United States*, 994 F.2d 763 (1993), these statutory provisions are instructive, but not controlling. The authority to suspend the 240-day priority period of Section 507(a)(7)(A))(ii) stems instead from a different statutory provision, Section 105(a) of the Bankruptcy Code. See 994 F.2d at 765. That Section provides bankruptcy courts with the authority to issue orders "necessary or appropriate to carry out the provisions [of the Bankruptcy Code,] * * * to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C. 105(a). Applying Section 105(a) in *United States* v. *Energy Resources Co.*, 495 U.S. 545, 549 (1990), this Court noted the "traditional understanding" that bankruptcy courts are courts of equity. See also *Pepper* v. *Litton*, 308 U.S. 295, 303-304 (1939). The district court orders in this case—suspending the 240-day priority period of Section 507(a)(7)(A)(ii) during petitioners' first bankruptcy case and for six months thereafter—represent an appropriate application of the established equitable tolling rule that suspends the running of a

party's rights during the period that the party is disabled from exercising a legal remedy. See, *e.g.*, *Cada* v. *Baxter Healthcare Corp.*, 920 F.2d 446, 450-451 (7th Cir. 1990), cert. denied, 111 S. Ct. 2916 (1991); 51 Am. Jur. 2d *Limitation of Actions* § 140 (1970).

The suspension also fulfilled the evident statutory design of affording the government a reasonable time to pursue collection efforts and of preventing debtors from escaping liability by shielding their assets in bankruptcy. *Richards* v. *United States*, 994 F.2d at 765. See S. Rep. No. 989, 95th Cong., 2d Sess. 14 (1978) ("the tax collector * * * should not lose taxes which he has not had reasonable time to collect or which the law has restrained him from collecting"); S. Rep. No. 1158, 89th Cong., 2d Sess. 3 (1966) (excepting priority taxes from discharge would "discourage recourse to bankruptcy as a facile device for evading tax obligations").[1]

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[1] Contrary to petitioners' contention, application of the equitable power of Section 105(a) to suspend the priority periods of Section 507(a)(7)(A) does not "disregard and override the clear and unambiguous statutory language found within the Bankruptcy Code" (Pet. 11). Nothing in the Bankruptcy Code precludes a bankruptcy court, as a court of equity administering equitable principles, from preventing tax evasion by suspending the priority periods of Section 507(a)(7)(A). As the court noted in *Richards* v. *United States*, 994 F.2d at 765, "[t]his use of the equitable authority in 11 U.S.C. § 105(a) is not inconsistent with any specific provision of the Bankruptcy Code, and * * * is consistent with the underlying philosophy of the Bankruptcy Code."

Nor does this use of equitable power "prejudice the debtors for serial filings in complete derogation of § 349(a)," as petitioners contend (Pet. 11). The decision of the court of appeals does not purport to prohibit serial filings. It merely prevents petitioners from escaping their tax liabilities by temporarily sheltering their assets in bankruptcy.

During the initial, joint bankruptcy proceeding, the government was prevented by the automatic stay of 11 U.S.C. 362(a) from collecting petitioners' tax liabilities.[2] The suspension of the 240-day period during petitioners' joint Chapter 13 case ensured that the fixed tax collection period provided to the government did not expire while debtors' assets were protected from collection. Section 6503 of the Internal Revenue Code provides an additional six months for collection of a debtor's taxes after a bankruptcy proceeding is dismissed. 26 U.S.C. 6503. Allowing that same six-month period in the comparable context of this case ensures that the government is not deprived of the full period Congress granted to pursue collection remedies. As the court of appeals noted, this additional period is necessary "to provide the IRS with sufficient time to restart and refocus its collection efforts once able to do so" (Pet. App. 10a).

For these reasons, the reported decisions of the courts of appeals have consistently concluded that the priority periods set forth in Section 507(a)(7)(A) are suspended during a debtor's prior bankruptcy proceeding.[3] As the

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[2] The filing of a petition for relief in bankruptcy operates as a stay of "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case" (11 U.S.C. 362(a)(6)). The stay remains in effect until the case is closed or dismissed, or a discharge is granted or denied.

[3] See, *e.g.*, *Richards* v. *United States*, 994 F.2d at 765 (240-day priority period of Section 507(a)(7)(A)(ii) is tolled during debtor's prior bankruptcy case); *Montoya* v. *United States*, 965 F.2d 554 (7th Cir. 1992) (three-year priority period of Section 507(a)(7)(A)(i) is tolled during pendency of prior bankruptcy while IRS was prevented from pursuing collection). See also *In re Bowling*, 147 B.R. 383 (Bankr. E.D. Va. 1992); *Linder* v. *United States*, 139 B.R. 950 (D. Colo. 1992); *Stoll* v. *Internal Revenue Service*, 132 B.R. 782, 785-786 (Bankr. N.D. Ga. 1990); *In re Ross*, 130 B.R. 312, 313 (Bankr. D. Neb. 1991); *In re Wise*, 127 B.R. 20, 23 (Bankr. E.D.

district court observed in *Molina* v. *United States*, 99 B.R. 792 (S.D. Ohio 1988), "Congress did not intend for a taxpayer to be able to escape liability by protecting assets in a bankruptcy proceeding until the statute of limitations expired." *Id.* at 795.

2. Contrary to petitioners' contention (Pet. 9-13), the decision in this case does not conflict with *Richards* v. *United States*, *supra*, or with the unpublished opinion of the Fifth Circuit in *Quenzer* v. *United States*, No. 93-2070 (Nov. 30, 1993). In those cases, as here, the government acknowledged that the literal terms of Section 108(c) of the Bankruptcy Code and Section 6503(b) of the Internal Revenue Code did not toll the priority periods of Section 507(a)(7)(A). The government contended instead that suspension of the priority periods was a proper exercise of the court's authority under Section 105(a) of the Bankruptcy Code. In *Richards*, the Tenth Circuit agreed and held that "11 U.S.C. § 105(a) is broad enough to permit the Bankruptcy Court's order to suspend the 240-day assessment period in 11 U.S.C. § 507(a)(7)(A)(ii) for the time Richards was in his first bankruptcy." 994 F.2d at 765. As the court of appeals noted in this case (Pet. App. 8a), the Tenth Circuit ap-plied a different analysis in *Richards* but reached the same result.[4]

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Ark. 1991); *In re Bryant*, 120 B.R. 983, 985 (Bankr. E.D. Ark. 1990); *In re Davidson*, 120 B.R. 777, 787 (Bankr. D.N.J. 1990); *United States* v. *Deitz*, 116 B.R. 792, 794 (D. Colo. 1990); *Florence* v. *Internal Revenue Service*, 115 B.R. 109, 112-113 (Bankr. S.D. Ohio 1990); *In re Quinlan*, 107 B.R. 300, 301 (Bankr. D. Colo. 1989); *Molina* v. *United States*, 99 B.R. 792, 795 (S.D. Ohio 1988); *In re Carter*, 74 B.R. 613 (Bankr. E.D. Pa. 1987); *Brickley* v. *United States*, 70 B.R. at 116.

[4] Petitioners contend (Pet. 10) that they would prevail under the holding of *Richards* because that court did not suspend the 240-day priority period for an additional six months after the first

In *Quenzer*, the Fifth Circuit declined to consider whether the priority period could be equitably suspended under Section 105(a) because the government had not raised that argument in the lower courts (Pet. App. 20a). Since the government relied exclusively on Section 105(a) on appeal, the Fifth Circuit merely adopted the government's concession that the literal terms of Sections 108, 507 and 6503 do not themselves compel the suspension of the priority period (Pet. App. 18a). The decision of the court of appeals not to publish its per curiam opinion in *Quenzer* reflects the lack of precedential significance that the panel attached to its narrow holding.[5]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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bankruptcy case was dismissed. In *Richards*, however, it was not necessary for the court to extend the period of suspension for an additional six months. The suspension of the 240-day period during the time in which Richards was previously in bankruptcy was sufficient to entitle the IRS's claim to priority status in his second bankruptcy case. As a result, the court in *Richards* did not address whether the priority period should be suspended for an additional six months after the first bankruptcy case was dismissed.

[5] Rule 47.5.3 of the Rules of the Fifth Circuit provides that every opinion believed to have precedential value is to be published.